U.S. Department of Justice
Office of
The Deputy Attorney General

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TO: Dick Hauser

FROM: Roger Clegg

Per your request.

No. 84-5240

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MARIE LUCIE JEAN, ET AL., PETITIONERS

v.

ALAN C. NELSON, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether petitioners, a class of excludable Haitian aliens seeking admission into the United States, may invoke the Fifth Amendment to challenge the exercise of the Attorney General's authority to parole unadmitted aliens into this country pending a determination of their admissibility.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (J.A. 292-354) is reported at 727 F.2d 957. The vacated opinion of the court of appeals panel (J.A. 193-291) is reported at 711 F.2d 1455. The pertinent opinions of the district court (J.A. 113-174 and 78-100) are reported at 544 F. Supp. 973 and 532 F. Supp. 881.

JURISDICTION

The judgment of the en banc court of appeals (J.A. 356-357) was entered on February 28, 1984. A petition for rehearing was denied on May 4, 1984 (J.A. 355). The petition for a writ of certiorari was filed on August 1, 1984, and was granted on December 3, 1984 (J.A. 358). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, with out due process of law * * *.

2. 8 U.S.C. 1182(d)(5)(A) provides:

> The Attorney General may, except as provided in subparagraph (B), in his discretion, parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

STATEMENT

A. Background and Proceedings Below

1.a. Section 235(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1225(b), provides that "[e]very alien * * * who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer." Section 212(d)(5)(A) of the Act, 8 U.S.C. 1182(d)(5)(A), modifies this detention mandate by authorizing the Attorney General, "in his discretion," to parole into the United States any alien applying for admission "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." The statute makes clear, however, that such parole "shall not be regarded as an admission of the alien" and that the alien shall be returned forthwith to custody when, "in the opinion of the Attorney General," the purposes of the parole have been served (ibid.).

b. In February 1981, the Select Committee on Immigration established by President Carter issued a report declaring that an

immigration crisis exists in the United States (J.A. 120). Principal reasons for the crisis included the arrival on our shores of increasing numbers of aliens lacking required entry visas and a policy under which such undocumented aliens were routinely paroled prior to hearings on their applications for admission. As a result, further illegal immigration was encouraged (id. at 118-120 & n.17) and aliens often failed to appear at their hearings (Tr. 2398-2399). See also Report by the General Accounting Office, Detention Policies Affecting Haitian Nationals 15 & n.4 (June 16, 1983) (hereinafter GAO Rep.). The flood of undocumented aliens included an estimated 35,000 Haitians who arrived and were paroled into South Florida between 1972 and 1981, and some 125,000 Cubans who arrived in the region in the spring of 1980 in a massive "boatlift" orchestrated or permitted by Cuban authorities, originating in Mariel Harbor (J.A. 118-120).

Because of the continuing immigration crisis confronting the Nation, in March 1981 President Reagan appointed a special cabinet-level task force, presided over by the Attorney General, to consider solutions to the pressing problems involved. The task force developed several responsive policy proposals. Among these was a recommendation that the government return to a general policy of detaining incoming aliens unable to support their claims for admission to this country (J.A. 120-122). A policy of detention of such aliens had been applied by the government during the 1940s and early 1950s but was largely abandoned following 1954, when the detention facility at Ellis Island was closed and the Attorney General began to exercise his parole authority more leniently, allowing most undocumented aliens to be at large within our borders pending appropriate immigration proceedings in which their admissibility would be determined (id. at 122 n. 18).

On July 30, 1981, the President issued a statement concerning the Nation's immigration policy, emphasizing the need to "'establish control over immigration'" and indicating that the Attorney General would be taking measures to ensure that aliens are admitted to the United States "'in a controlled and orderly fashion . . .'" (J.A. 123). On the same day, the Attorney General testified before a joint hearing of the Senate and House subcommittees with jurisdiction over immigration and refugee matters. He advised Congress of the severe problems in the immigration area, noting that the Nation has "'lost control of [its] borders,'" has "'pursued unrealistic policies,'" and has "'failed to enforce [its] laws effectively'" (ibid.). He further testified that the government's effort to regulate the entry of aliens has "'crumbled under the burden of overwhelming numbers'" (ibid.). In outlining a remedial strategy, the Attorney General underscored the "'necessity of detaining illegal aliens pending exclusion'" (ibid.).

Consistent with these pronouncements, a key element of the new immigration policy endorsed by the task force, approved by the President and announced by the Attorney General "called for more restrictive use of parole and increased use of detention" (J.A. 123). The Immigration and Naturalization Service (INS) implemented this "new" policy (which in many ways was a return to the "old" pre-1954 policy embodied in the Immigration and Nationality Act) by issuing "general instructions to its field officers to start detaining excludable aliens who do not establish a prima facie claim for admission" (id. at 124). __/

__/ An "excludable" alien is an alien subject to exclusion under the Immigration and Nationality Act who has been stopped by INS officials at the border and who therefore has not effected an entry into the United States. A "deportable" alien, by contrast, is one who has managed -- legally or otherwise -- to enter the United States, and is, by virtue of such entry, no longer subject to exclusion proceedings but only to deportation proceedings. See, e.g., Leng May Ma v. Barber, 357 U.S. 185, 187 (1958); see also Landon v. Plasencia, 459 U.S. 21, 25-26 (1982). Petitioners are agreed to be excludable aliens; this case presents no ques-
(Continued)

By July 31, 1981, then, the "new" policy of more restrictive use of parole was initiated with respect to excludable aliens generally, including the continuing stream of arrivals from Haiti (id. at 125). See also GAO Rep. 15-16.

2. This litigation was commenced by filing of a petition for a writ of habeas corpus (J.A. 14-23) in the United States District Court for the Southern District of Florida on June 10, 1981. An amended petition combined with a complaint for declaratory, injunctive and mandatory class action relief (id. at 24-46) was filed on June 16, 1981. Defendants and respondents included the Attorney General, the INS, the Commissioner of Immigration and Naturalization and several regional and local INS officials. The complaint, which was amended on August 24, 1981 (id. at 49-56), set out seven causes of action. Among these was a claim that respondents had treated Haitian aliens differently from other groups of aliens in connection with their detention and other matters relating to their applications for admission, and had thereby discriminated against petitioners on the basis of race and national origin, in alleged violation of the Fifth Amendment (J.A. 38-39).

On September 30, 1981, the district court (Hastings, J.) granted petitioners' motion for class certification and converted a temporary restraining order (entered simultaneously, "nunc pro tunc to September 9, 1981") into a preliminary injunction barring the government from proceeding with exclusion hearings against members of the class (J.A. 58-69). As later modified (id. at 83 (footnote omitted); see also id. at 176, 294 n.2), the certified class

> consists of all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and who are presently in detention pending exclusion proceedings at various INS detention facilities, for

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tion concerning the rights of aliens who have managed to effect an entry into the United States.

> whom an order of exclusion has not been entered and who are either: (1) unrepresented by counsel; or (2) represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association. [__/]

On February 24, 1982, the district court (Spellman, J.) dismissed many of petitioners' claims on jurisdictional grounds (J.A. 78-100). Petitioners' surviving claims were then as follows: (1) Count II, which alleged that the change in the government's parole policy was unlawfully effectuated without observance of the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA), 5 U.S.C. 553; (2) Count IV insofar as it alleged violations of a First Amendment right of access by detained Haitians to persons not in detention, and by the Haitian Refugee Center, Inc., to persons in detention, and (3) Count VII insofar as it challenged the revised parole policy as discriminating on the basis of race and national origin in alleged violation of the equal protection component of the Due Process Clause of the Fifth Amendment.

3. Following a trial, the district court issued findings of fact and conclusions of law (J.A. 112-174) on June 18, 1982. The court ruled in petitioners' favor on the APA claim, holding that the revised parole policy should have been promulgated in accordance with the notice-and-comment rulemaking procedures (id. at 150-159). The court reserved judgment on the First Amendment claims, suggesting that, depending on the kind of relief to be awarded in respect of petitioners' APA claim, the First Amendment claim might become moot (id. at 159 n.49). Although it recognized that a similar disposition of the equal protection

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__/ In its final judgment, the district court further modified the class certification by enlarging the class to include all detained Haitians for whom a counsel's notice of appearance form had been entered (J.A. 184). The court earlier had modified the preliminary injunction to allow the government to proceed with exclusion hearings for those petitioners who were represented by counsel, but the modified injunction provided that no final order of exclusion against such a petitioner could be executed without prior notice to the district court (id. at 82-83 n.6).

claim was possible (id. at 159), the district court determined to reach the issues presented by that claim, in order to avoid a remand "for findings on issues already tried" in the event the court of appeals reversed its ruling on the APA issue (ibid.).

On the discrimination claim, the district court held that the government did not violate the equal protection component of the Fifth Amendment Due Process Clause (J.A. 159-169, 173). After careful consideration of the voluminous factual record (including live testimony during a six-week trial), the district court found that "[t]he policies and practices challenged herein, including detention, were proposed to and approved by the President of the United States in the context of developing a comprehensive new immigration policy," and that "[t]hese measures were intended to be applied to all aliens regardless of their race or national origin" (id. at 166-167). The court found that the revised parole policy was "designed to deal with another Mariel type situation, regardless of the nationality or number of the arriving aliens" (id. at 124). Although it had turned out, for a variety of reasons, that "Haitians [we]re impacted to a greater degree by the new detention policy than aliens of any other nationality at the * * * time" (id. at 165), the court found that the policy was "intended to be fair and * * * that if another class of aliens arrived in this country in a situation similar to that of the [petitioners] they would be treated in a similar fashion" (id. at 169; footnote omitted).

The district court concluded that the statistical evidence adduced by petitioners to show that Haitians were disproportionately affected by the government's revised parole policy "does not deserve much weight in determining the merits of [petitioners'] discrimination claim" (J.A. 128). The court observed that the statistical method employed by petitioners' expert was designed to test the probability that a particular result could have come about in a random manner, but that

"[p]arole is not a random process and the probability of parole is not the same for every person" (ibid.). The statistician's analysis failed to take account of many relevant factors, such as the alien's age and health, the alien's reasons for seeking parole, the pendency of an asylum request by the alien, or the presence of a minor with the alien. Indeed, the only parole criterion that petitioners' statistician had adjusted for was the documentation status of the alien. Ibid. And even with respect to documentation, the expert's purported controls were "far too simplistic" because they did not distinguish between different types of documents possessed by aliens seeking admission or adjust for differences respecting the apparent validity or lack of regularity in any documentation presented (ibid.). In short, the court found that the evidence "simply did not establish the existence of a statistically significant relationship between being detained and being Haitian in the context of similarly situated individuals" (ibid.).

On the ultimate factual question of whether the challenged immigration policy was motivated by an invidiously discriminatory purpose in violation of the Due Process Clause, the district court found that petitioners failed to establish that respondents intended to discriminate against petitioners on the basis of race or national origin. Accordingly, the court rejected petitioners' Fifth Amendment claim. The court summarized its factual finding as follows (J.A. 173):

> [Petitioners] have failed to prove by a preponderance of the evidence that they were incarcerated because of their race and/or national origin. The evidence shows that the detention policy was not directed at [petitioners] because they were black and/or Haitian, but because they were excludable aliens unable to establish a prima facie claim for admission and that non-Haitians were detained pursuant to this policy as well. The mere fact that more Haitians were detained and kept in detention for longer periods of time than aliens of other nationalities does not render the policy discriminatory. Regardless of its ultimate impact, the policy was intended to be applied and was in fact applied

> equally to all similarly situated aliens regardless of their race and/or national origin.

Following a hearing on the relief to be ordered in connection with its APA ruling, the district court rendered its final judgment on June 29, 1982 (J.A. 175-185). In view of its holding that the government's revised parole policy was not promulgated in accordance with APA rulemaking procedures, the court declared that the new policy was "null and void" and that the prior policy was restored to "full force and effect" (id. at 178). Therefore, the court ordered that all class members in detention were to be released on parole under an interim plan, subject to certain terms and conditions (id. at 179-184). The court further held that, in light of the relief awarded, petitioners' First Amendment access claims had indeed become moot (id. at 175-176 n.2).

By order of June 30, 1982, the district court refused to stay the requirement that petitioners be released from detention. On July 2, however, the court granted a partial stay, authorizing future detention of excludable aliens refused parole in accordance with a properly promulgated regulation. On July 13, 1982, the court of appeals likewise denied the government's request to stay that portion of the district court's order requiring release of petitioners from detention (J.A. 191-192). As a result, the members of the class were paroled, but subsequent arrivals have been detained in accordance with the new parole regulations, which have been codified at 8 C.F.R. 212.5 (J.A. 296).

4. Respondents appealed from the district court's ruling on the APA issue. Petitioners took a cross-appeal, pressing their due process and First Amendment claims, as well as two other

claims that the district court had dismissed on jurisdictional grounds in a preliminary ruling (see page , supra). __/

A panel of the court of appeals ruled for petitioners on all issues save one (J.A. 193-291). The panel affirmed the district court's judgment with regard to the APA claim, although it adopted a different rationale for its ruling (id. at 219-237). On the other hand, the panel reversed the district court's judgment in favor of respondents on the Fifth Amendment discrimination claim, concluding that the district court's extensive findings of fact on this complex matter were clearly erroneous (id. at 238-276).

In connection with the due process claim the panel observed preliminarily that, although petitioners "consistently have addressed this case as one premised both on nationality (Haitian) and race (black) [,] [t]he bulk of the evidence * * * was addressed to the nationality claim" (J.A. 243 n.29). Accordingly, the panel analyzed the claim in terms of nationality-based discrimination, and framed its instructions on remand in terms of "ensur[ing] that all aliens, regardless of their nationality or origin, are accorded equal treatment" (id. at 291; footnote omitted).

The panel acknowledged that the government's new parole policy was publicly described by high-level officials as requiring "evenhanded treatment" (J.A. 212). But it concluded that the evidence offered by petitioners precluded any such characterization of the parole policy actually implemented by

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__/ The additional claims presented the following questions: (1) whether individuals appearing for a preliminary inspection at the border are entitled to counsel and to be advised of any such right, and (2) whether INS must advise individuals of their right to apply for political asylum.

low-level INS officials in the field. __/ Notwithstanding the testimony of high-ranking "INS officials * * * that the [new parole] policy was intended to be applied 'across the boards,' but had its greatest impact on Haitians because no one else was 'similarly situated'" (id. at 258) the panel concluded that petitioners had offered evidence of "intentional government discrimination against Haitians" (id. at 259) and that the government had failed to overcome this showing (id. at 259-275). __/

In light of its rulings, the court of appeals panel concluded that petitioners had impermissibly been denied parole (J.A. 291). It directed that the parole of petitioners ordered by the district court be continued, and remanded for entry of a remedial order that would ensure that the new parole policy "is

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__/ In discussing the APA issue the panel acknowledged that "[t]he Administration announced a broad policy of detention" (J.A. 236 n.26) and stated that "the genesis of discriminatory enforcement may have been only a failure to clarify a general policy" (id. at 236), explaining (id. at 235):

> Those who formulated the policy failed to convey the policy to those responsible for implementing it. Left without guidance as to how to implement an undefined policy, the immigration inspectors enforced the detention policy as if it was intended to apply solely, and uniformly, to Haitians.

__/ The panel also held that the district court had erred in dismissing, on jurisdictional grounds, petitioners' claim concerning advice of their right to seek asylum before the INS district director (J.A. 276-285). On the other hand, the panel sustained the district court's "discretion in dismissing the notification of a right to counsel claim as unexhausted" (id. at 284). Proceeding to the merits of the asylum notice claim, the panel held that the Fifth Amendment requires that excludable aliens such as petitioners be notified that they have a constitutionally protected right to seek asylum before the INS district director (id. at 286-287).

Finally, the panel concluded that the claim of the non-class petitioner, Haitian Refugee Center, Inc., that it has a First Amendment right of access to the detained class petitioners was not moot (J.A. 287-288). This claim was remanded to the district court for further proceedings (id at 288-289).

effectuated in the future in a non-discriminatory manner" (ibid.). __/

5. The court of appeals granted the government's petition for rehearing en banc (714 F.2d 96 (11th Cir. 1983)), thereby vacating the panel opinion (see 11th Cir. R. 26(k)). The en banc court dismissed in part, reversed in part, and remanded with instructions (J.A. 356-357).

All members of the en banc court of appeals agreed that the APA claim was moot because the government had, subsequent to the district court's decision, promulgated regulations in accordance with the APA, and because the only persons remaining in detention in the wake of the district court's order granting parole "either had their parole revoked for failure to comply with the terms of the district court's order * * * or arrived in this country after the government's promulgation of its new regulations" (J.A. 296). The en banc court accordingly directed that the government's appeal be dismissed and that the remedial provisions of the district court's judgment based upon its APA ruling be vacated (ibid.).

With respect to the due process claim, an eight-member majority of the court of appeals held that petitioners, as excludable aliens, were not entitled to invoke the Fifth Amendment to attack the Attorney General's refusal to grant them parole (J.A. 296-323, 341-343). Because "the decision to parole or detain is an integral part of the admissions process" (id. at 298; see also id. at 310-317), the court of appeals concluded that petitioners' claim was barred by the well-settled rule that "[a]liens seeking admission to the United States * * * have no

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__/ The panel observed that although the relief granted by the district court had been premised solely on a violation of the APA, the "terms of the relief ordered by the district court are not inconsistent with our holding here today and the court below should feel free to adhere to its original release program, supplementing it as necessary to ensure that there is no repetition of the equal protection violation" (J.A. 291 n.63).

constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress" (id. at 309). (The four other members of the court of appeals deemed it unnecessary to reach this issue. See page note , infra).

Although the court of appeals thus held that the government's parole policy was not subject to a constitutional due process attack, the court indicated (J.A. 323-331) that the implementation of this policy was not "immune from judicial review" to correct arbitrary exercise or withholding of discretionary action (id. at 323). The court of appeals held that judicial review was available to assure that there was a "'facially legitimate and bona fide reason'" for the action taken in the case of a particular alien (id. at 326, quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972); J.A. 330) and to determine "whether the actions of lower level officials in the field conform to the policy statements of their superiors in Washington" (ibid.). Because the court of appeals accepted the government's contention that, as the district court had found, the new restrictive parole policy was not designed to discriminate on the basis of national origin (id. at 298-299, 328-330), judicial review in this case could redress any unauthorized discrimination in the implementation of that policy (id. at 330-331):

> If the [district] court should find that low-level immigration officials have discriminated on the basis of national origin despite the adoption of a contrary policy by their superiors in the executive branch, such conduct would constitute an abuse of discretion that would justify appropriate relief.[__/]

__/ The parties had disputed whether Executive Branch officials share with Congress the authority to draw nationality-based distinctions among aliens seeking to enter the United States. See J.A. 328-329. Because the court of appeals determined that "responsible executive officials" had not sought to exercise such authority here and had instead established a non-discriminatory parole policy, it concluded that "resolution of this question is (Continued)

See also J.A. 299.

The court of appeals remanded the case so that this non-constitutional standard of review could be applied to the cases of those "class members presently in detention" (J.A. 330; see also id. at 342). The court of appeals directed that (id. at 330):

> [t]he district court on remand should conduct such proceedings as are necessary to determine whether there exists a facially legitimate and bona fide reason for [denying parole], remembering that it is not the court's proper role to "disregard the [stated criteria employed] or to substitute its own policy preferences for those of the official vested by law with discretionary authority to act on requests for parole" [Bertrand v. Sava, 684 F.2d 204,] 217 [(2d Cir. 1982)]. The district court should consider (1) whether local immigration officials in fact exercised their discretion under [8 U.S.C.] § 1182(d)(5)(A) to make individualized determinations and (2) whether the criteria employed in making those determinations were consistent with the statutory grant of discretion by Congress, the regulations promulgated by the agencies involved, and the policies which had been established by the President and the Attorney General.

The court of appeals thus concluded (J.A. 342-343) that, although "[e]xcludable aliens cannot challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole on the basis of the rights guaranteed by the United States Constitution," they "do have rights * * * to whatever process Congress -- and through its regulations and established policies, the Executive Branch -- have extended them," and accordingly "do[] not stand altogether outside the protection of our laws." __/

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not essential to our holding" (id. at 328-329). Nevertheless, the court of appeals stated that "there is little question that the Executive has the power to draw distinctions among aliens on the basis of nationality" and that this executive authority is vested in "responsible executive officials such as the President or Attorney General" under the Immigration and Nationality Act (J.A. 329 & n.30).

__/ The en banc court also addressed the asylum/notice and First Amendment access issues. The court of appeals held that the district court had jurisdiction to consider whether petitioners have a constitutional right to advice of their statutory right to seek asylum, but, on reaching the merits, held that there is no (Continued)

B. Current Posture of this Case

Before discussing the questions presented by the petition, we believe that it would be useful to clarify the current posture of this case. We do so because our further study of the decisions below and the arguments of petitioners as they now emerge in this Court persuade us that the questions presented bear a rather remote relationship to petitioners' interests.

We do not suggest that the case is moot. Nor do we urge that the writ of certiorari should be dismissed as improvidently granted. There has been no significant charge in the dimensions of the case since the Court granted certiorari; the Court has discretion to decide the question presented and its resolution is important to the administration of our immigration laws. Nevertheless, the Court should be fully aware of the following considerations.

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constitutional right to such notice (J.A. 331-340). The court of appeals also held that the Haitian Refugee Center's First Amendment access claim was not moot, but could not be properly evaluated on the existing record (id. at 340-341). This claim was remanded to the district court (id. at 341).

Judge Tjoflat, who joined the majority opinion in all other respects, dissented with regard to the scope of nonconstitutional review available on remand, criticizing that remand as unduly broad and needlessly intrusive upon intra-Executive Branch communications (J.A. 343-346). He suggested that the court of appeals had unrealistically posited a dichotomy between general INS policy set at the national level and implementation of that policy in the field (id. at 344-345). Instead, Judge Tjoflat reasoned, the courts should "assume the Attorney General to adopt the actions of his officers in the field and ask him to justify them" under a narrow abuse of discretion standard (id. at 344, 345-346).

Judge Kravitch, joined by three other members of the court, concluded in a separate opinion that, in light of the scope of nonconstitutional review available on remand, "the district court and the panel erroneously reached the constitutional questions," that those questions were not properly before the court of appeals, and that the majority's discussion of them "can only be viewed as dicta" (J.A. 347, 348). Although these judges apparently agreed with the majority that the authority of the Executive to draw distinctions among aliens based on nationality was not before the court (id. at 347-348 & n.2), they argued that distinctions drawn by high-level officials must be rational in order to pass muster under an abuse of discretion standard (id. at 348-351). Finally, the judges joining in the separate opinion dissented from the majority's ruling on the asylum/notice issue (id. at 353-354).

It is fundamental that this Court reviews judgments rather than statements in the opinions that underlie them. Mississippi University for Women v. Hogan, 458 U.S. 718, 723 n.7 (1982). It is therefore appropriate to ask whether resolution of the questions presented by petitioners is likely to have a substantial effect on the court of appeals' judgment. We think this doubtful for two reasons. First, the members of the class generally have already received the relief (release on parole) to which they claim they were entitled. Second, as to any class members now in detention, the court of appeals' remand provides an opportunity for redress on nonconstitutional grounds if it can be shown that their detention is attributable to unauthorized discrimination.

1. As we have explained (pages 6, 9, supra), based on its Administrative Procedure Act ruling the district court's final judgment required the release of all class members in detention on the date of the judgment, and barred future detention of new arrivals until the new parole policy was embodied in a rule published under the APA. The INS has now promulgated the regulation required by the district court's judgment. See 8 C.F.R. 212.5. Thus, any current detention of excludable Haitians either is being carried out pursuant to the new regulation or results from the detainees' violation of the terms of the district court's release plan. See page 12, supra. There accordingly is no reason to determine whether a showing of discrimination in the original detention of class members would have entitled them to the remedy of release on parole. __/

Of course, some members of the class apparently are now in detention, and others who are presently paroled may in the future

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__/ We note that the district court reached the due process issue only because of its concern that judicial economy would be ill served in the event that its APA ruling were reversed (J.A. 159 & n.49; see pages 6-7, supra). Significantly, the court of appeals panel left open the question whether its finding of discrimination required any change in the district court's judgment. See page 12, note ___, supra.

again be detained. But any discrimination claims that might arise from such detention would be quite different from the claims made here. __/

2. The court of appeals' ruling already affords petitioners an opportunity to seek relief from any unauthorized discrimination on nonconstitutional grounds that are not before the Court. In such circumstances, the Court's usual practice is to

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__/ Challenges to detention may in the future be raised by three classes of persons: (1) those class members who have been redetained following the district court's release order because of a violation of its terms, (2) those Haitians who have recently been detained on arrival pursuant to the uniform regulation governing parole promulgated in response to the district court's APA ruling, and (3) those class members whose parole may be revoked at such time as the district court acts upon the court of appeals' direction to vacate its APA-based injunction (see page 12, supra). None of these groups could present a claim similar to that presented here by petitioners.

Even if a claim of discriminatory detention were in the future advanced by any such persons, it could not arise out of the events and evidence reviewed by the district court pertaining to the government's initial implementation of its new parole policy -- the basis for the claim before this Court. Moreover, the first group of detainees plainly could raise no colorable equal protection objection. The district court's order expressly authorized revocation of parole for those who "inexcusabl[y]" fail to meet the terms of their parole or who are deemed a security risk or likely to abscond (J.A. 179, 183, 184 & n.6).

As to the second and third groups of detainees, any detention would arise from the routine and practiced application of the published regulation that establishes uniform guidelines regarding detention pending exclusion proceedings. Significantly, despite their disagreement on other key matters, each of the opinions below strongly suggests that any problem of unequal application of the new parole policy that may have accompanied its initial introduction was purely transitional and temporary in nature (J.A. 170, 235-236 & nn.24, 26, 330; see page 11 & note , supra). We note, as well, that the district court has recently determined that Haitians detained under 8 C.F.R. 212.5 are outside of the certified class. See Order on Mandate, No. 81-1260-CIV.-EPS (S.D. Fla. June 8, 1984), at 1 n.1. And as to the final group of persons that may be subject to detention, such detention would not follow automatically from the lifting of the district court's injunction. Rather, the Attorney General would first have to exercise his statutory authority to determine whether, and in what circumstances, particular paroled aliens should be restored to detention.

decline to decide constitutional questions unnecessarily. See New York Transit Authority v. Beazer, 440 U.S. 568, 582 & n.22 (1979); Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

The en banc court of appeals held that a denial of parole is reviewable -- wholly apart from the provisions of the Fifth Amendment -- for abuse of discretion, and indicated that such an abuse could be made out in the present case by demonstrating a discriminatory denial of parole in contravention of the nondiscriminatory uniform national policy. See pages 13-15, supra. To the extent that any member of the class remains in detention, he thus retains the opportunity to seek relief upon showing that his detention is attributable to unauthorized discrimination by low-level INS enforcement officials. Because of the availability of this statutory remedy, it may not be necessary to decide here whether the Constitution grants petitioners an additional avenue for relief. See Califano v. Yamasaki, 442 U.S. 682, 693 (1979); Bertrand v. Sava, 684 F.2d 204, 207 n.6 (2d Cir. 1982). Indeed, the members of the panel (who had initially concluded that the Fifth Amendment does allow a challenge to discriminatory exercise of parole authority (J.A. 238-241)), ultimately concluded that there was no reason for the court of appeals to reach the constitutional issue here, that the district court and the panel had done so erroneously, and that the en banc court's discussion of the issue was dictum (see page 15 n.).

Moreover, this view of the case is reinforced by petitioners' acceptance of the court of appeals' conclusion that the new parole and detention policy established by responsible Executive Branch officials is nondiscriminatory (Pet. Br. 7-10, 30, 37, 38). And they have altered their claim accordingly. The gravamen of that claim is now that INS field officials enforced a facially neutral detention policy in an unauthorizedly discrimi-

natory fashion against Haitians (see, e.g., id. at 1, 3, 10, 16, 21-22, 30, 42). __/ As petitioners' argument now emerges (id. at 37; emphasis added):

> This case does not implicate the authority of Congress, the President or the Attorney General. Rather, it challenges the power of low-level politically unresponsive government officials to act in a manner which is contrary to federal statutes, treaty, and the directions of the President and the Attorney General, both of whom provided for a policy of nondiscriminatory enforcement.

See also Pet. Br. 36-39. Given this reformulation of petitioners' claim, the court of appeals' statutory analysis offers them a complete remedy.

3. Petitioners' discussion of the relief they seek confirms the peculiar posture of this case. They complain, somewhat disingenuously, that the court of appeals' remand "is directed only to those 'class members presently in detention'" and "provides no relief for[] the approximately 1700 class members who have been released from detention" (Br. 21 n.27, quoting J.A. 330). Petitioners acknowledge, however, that the only additional relief they could seek in the event of a reversal by this Court

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__/ Petitioners had heretofore claimed at least in part that responsible high-level INS officials had themselves designed a discriminatory parole policy. Both the Attorney General and the INS Commissioner were named as defendants (J.A. 30) and the complaint makes no mention of the theory that low-level officials were responsible for any discrimination. Instead, the complaint charged without differentiation that "Defendants have followed a 'Haitian Program,' treating Haitian refugees differently than other refugee groups" (J.A. 38). See also Pretrial Stipulation at J.A. 106; 5/14/82 Tr. 84, 133-137, 153-157, 171-172; 5/18/82 Tr. 143; Pet. Opening Br. before the court of appeals panel 6-10. The opinion of the district court confirms that petitioners did not then draw the distinction upon which they now rely. See e.g. J.A. 160-169, 173.

The new focus of petitioners' argument appears to be a response to the vacated opinion of the court of appeals panel and the decision of the en banc court. See pages 11, 13-15, 18, supra. The panel's opinion makes clear that petitioners there sought to prove discriminatory intent on the part of high-level INS officials (see J.A. 251-254, 257-259). The en banc court of appeals' discussion of the authority of responsible Executive officials to draw nationality-based distinctions also reflects petitioners' continuing pursuit of their claim of high-level discrimination (see id. at 329-329 & n.30).

would be "injunctive relief to prevent the recurrence of the pattern of discrimination to which Haitians have been subjected" (Pet. Br. 21 n.27). Petitioners thus seem to recognize that the question presented is of only academic interest except insofar as it might support entry of an injunction against future low-level discrimination. _/

_/ Petitioners have not explained the nature or scope of the injunction they seek. In light of the broad authority of the Attorney General to implement nationality classifications in enforcing the immigration laws (see pages 48-56, infra), the unlikelihood of the repetition of circumstances that underlie any colorable claim of discriminatory enforcement (see page 18, supra), and doctrines that limit the granting of injunctive relief, we very much doubt that any such relief would be available. See, e.g. Los Angeles v. Lyons, No. 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362, 376-377 (1976); see also Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982); Sampson v. Murray, 415 U.S. 61, 83 (1974); Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944). In any event, to the extent that injunctive relief may not be foreclosed, petitioners have not explained why the availability of a nonconstitutional right of review recognized by the court of appeals would not provide an adequate basis for an equitable remedy.

SUMMARY OF ARGUMENT

The question presented in this case goes to the very heart of the sovereign power of the United States to determine whether particular aliens shall be eligible to enter our Nation and join our society. Acting pursuant to statutory authority, the President, the Attorney General and other responsible Executive Branch officials have in recent years carefully formulated immigration policies deemed necessary to regain control of our borders. A key part of this effort is the restrictive parole policy challenged here, which is designed to discourage future waves of illegal immigration by greatly restricting the opportunity for excludable aliens to be paroled pending a determination of admissibility. There is no warrant for reading the Constitution to authorize the courts to override this policy determination made by the political branches of government and to afford the remedy of parole into the United States to a class of aliens stopped at our borders whose admissibility has never been demonstrated.

A. For nearly a century, this Court has recognized the plenary authority of the Legislative and Executive Branches over matters pertaining to the admission or exclusion of aliens. See The Chinese Exclusion Case, 130 U.S. 581 (1889); Nishimura Ekiu v. United States, 142 U.S. 651 (1892). This sovereign authority is at its zenith with respect to excludable aliens -- those who stand "on the threshold of initial entry" (Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953)) -- as distinguished from deportable aliens, who have already gained entry within our borders in some fashion. See Leng May Ma v. Barber, 357 U.S. 185, 187 (1958).

Petitioners concededly fall within the former category; they are excludable aliens. Accordingly, as this Court has long held and repeatedly reaffirmed, they have "no constitutional rights regarding [their] application[s]" for admission to this country (Landon v. Plasencia, 459 U.S. 21, 32 (1982)). This settled constitutional rule does not mean that petitioners are not "persons" within the meaning of the Fifth Amendment; nor does it suggest that they have no rights to due process or other constitutional protections. Rather, the rule means only that, when petitioners challenge the authorized determinations of the

Attorney General respecting their applications for admission to this country -- or their demand for de facto admission by parole -- invocation of the Fifth Amendment does not enlarge their rights: "Whatever the procedure authorized by Congress is, it is due process as far as an [excludable] alien denied entry is concerned." United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

B.1. Congress has commanded the Attorney General to detain "for further inquiry" every alien not "clearly and beyond a doubt entitled to land" (8 U.S.C. 1225(b)), but has conferred upon him some discretion to parole unadmitted aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest" (8 U.S.C. 1182(d)(5)(A)). In order to deal more effectively with a threatened breakdown of governmental control over our borders and stem the tide of illegal immigration, the Attorney General determined in 1981 that it was necessary to institute a restrictive parole policy under which excludable aliens unable to demonstrate a right of admission were generally to be detained as authorized by statute, rather than granted discretionary parole.

Petitioners' attempt to raise a due process challenge to this exercise of the Attorney General's parole and detention authority is foreclosed by the long-settled principles set forth above. When unadmitted aliens seek temporary admission via parole pending the outcome of their exclusion proceedings, the Attorney General's exercise of discretion is part and parcel of the exclusion process itself. As this Court has observed, "detention or temporary confinement" is "part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens * * *." Wong Wing v. United States, 163 U.S. 228, 235 (1896); see also Carlson v. Landon, 342 U.S. 524, 538 (1952). Mezei, too, confirms that parole decisions are an integral part of the exclusion process.

Indeed, any distinction between parole and admission would be wholly incompatible with the bases for the entry doctrine established by this Court's decisions. Release on parole means de facto admission into this country. Although such temporary admission does not alter the alien's legal status as "excludable" (8 U.S.C. 1182(d)(5)(A)), as a practical matter it enables him to remain physically at large within our borders until final disposition of his application for admission. A paroled alien may abscond, obtain employment (lawfully or unlawfully) that would otherwise go to an American citizen, or cause other harms that our immigration laws are designed to prevent. Moreover, as this case illustrates, parole often amounts to admission for a extended period of years. Accordingly, recognition of the right to judicially-mandated parole sought by petitioners cannot be reconciled with the plenary authority of the political branches to govern the admission of aliens into the United States.

2. Petitioners argue that because they claim to have suffered unlawful discrimination among excludable aliens, the entry doctrine is inapplicable. But the obstacle to judicial review of the denial of parole arises from the nature of the remedy sought, not the nature of the right invoked or the violation claimed. The courts simply lack authority to authorize entry into the United States by an unadmitted alien where the political branches have denied that benefit.

C.1. The unavailability of extrastatutory judicial review of denial of parole also follows from the broad authority of the political branches to apply nationality distinctions in framing and implementing the immigration laws. This Court has recognized that in the immigration context the government "regularly makes rules that would be unacceptable if applied to citizens," among them rules governing exclusion of aliens, and that even when resident aliens are affected, such rules and classifications are

not subject to the standards used to judge claims of discrimination under the Fourteenth Amendment. Mathews v. Diaz, 426 U.S. 67, 80, 87 (1976). The political branches have authority to adopt a "wide variety of classifications * * * in light of changing political and economic circumstances"; such classification decisions are "frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary" (id. at 81). Thus, even when the rights of admitted aliens are at issue, such classifications may be set aside only when "wholly irrational" (id. at 83) or lacking facial legitimacy (Fiallo v. Bell, 430 U.S. 787, 798 (1977)).

Because of the inherent subject matter of immigration law -- the relationship of the United States with nationals of various foreign countries -- nationality classifications have been commonplace in this context. The courts have consistently recognized the validity of such classifications. Moreover, such classifications are supported by compelling justifications. On occasion, they have been adopted "in order to make a humane response to a natural catastrophe or an international political situation" (Diaz, 426 U.S. at 81); but they are equally necessary when the actions of a foreign government or its people require the political branches to restrict the opportunity for entry. See The Chinese Exclusion Case, 130 U.S. at 606. Because the Nation's policies regarding admission of aliens are inextricably bound up with control over foreign relations, any rule inhibiting the ability of the Executive and Legislative Branches to draw nationality classifications in this field would diminish the United States' sovereign authority to protect itself against threats to our interests in the world arena.

In the special context of claims of unadmitted aliens, considerations of sound policy and separation of powers dictate that court-ordered parole be foreclosed when inconsistent with the determinations of the political branches. The courts lack the expertise and information sources that would be necessary to

appraise the basis for nationality classifications established with regard to the entry of aliens. Nor do they possess standards by which to assess the justifications for such distinctions. Accordingly, any effort to undertake such judicial review would be an empty formality that would serve only to burden and intrude upon sensitive operations of the Executive.

2. Assuming that petitioners were able to show that nationality classifications adversely affected their chances for parole, the circumstances that existed at the time petitioners attempted unlawfully to enter the United States provide ample justification for such a policy. As petitioners now concede, the restrictive parole policy instituted in 1981 was intended to be applied evenhandedly to aliens seeking admission. Even the court of appeals panel recognized (J.A. 198), however, that the Nation's immigration crisis had, because of the influx of excludable Haitian and Cuban aliens, assumed special dimensions in South Florida by mid-1981. That influx, which had caused massive disruptions to the State of Florida and the communities affected, was a major factor in the adoption of the new parole policy. Under the circumstances, and given the Attorney General's determination that liberal parole merely encouraged further illegal entries, it would have been entirely permissible to implement the new parole policy vigorously and promptly with respect to petitioners.

ARGUMENT

THE FIFTH AMENDMENT PROVIDES NO BASIS FOR OVERRULING THE ATTORNEY GENERAL'S DECISION TO DENY PAROLE TO AN EXCLUDABLE ALIEN PENDING DETERMINATION OF THE ALIEN'S ADMISSIBILITY TO THE UNITED STATES

A. The Due Process Clause Does Not Augment the Statutory Rights of Excludable Aliens Regarding Determinations Related to Their Admission to the United States

1. From its very first examination of the federal government's exclusion power nearly a century ago, this Court has consistently recognized the plenary authority of the Legislative and Executive Branches to establish and implement, free from judicial intervention, the substantive criteria and procedures

for determining whether an alien should be admitted to the United States or whether he should instead be denied the right to enter and thus be excluded. See The Chinese Exclusion Case, 130 U.S. 581, 603-604, 606, 609 (1889); Nishimura Ekiu v. United States, 142 U.S. 651 (1892). The untrammeled authority to govern admission of aliens is a fundamental and inherent attribute of sovereignty. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950). See also 8 M. Whiteman Digest of International Law 581 et seq. (1967); 3 G. Hackworth Digest of International Law 725 et seq. (1942). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens (Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)). And this pervasive authority extends to both the Legislative and Executive Branches in the fulfillment of their respective functions.

> The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.

Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

Although "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law" (Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953)), aliens who have not been admitted to this country are governed by a different constitutional rule. "[A]n alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." Ibid. (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. at 544). An alien's right "to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." Mezei, 345 U.S. at

216. See also Nishimura Ekiu v. United States, 142 U.S. at 660 (emphasis added):

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of government. As to such persons the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.

The critical distinction between aliens who have gained entry to the United States and those who have not is ingrained in our law. The absence of extra-statutory protection for unadmitted aliens seeking initial admission has consistently been recognized. The Court observed in Leng May Ma v. Barber, 357 U.S. 185, 187 (1958):

> [O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry."

Similarly, the Court indicated in Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953) (emphasis added), that an immigration regulation denying a hearing on an order of permanent exclusion "raises no constitutional conflict if limited to 'excludable' aliens who are not within the protection of the Fifth Amendment."

In Kleindeinst v. Mandel, 408 U.S. 753, 762 (1972), the Court reiterated that "an unadmitted and nonresident alien [has] no constitutional right of entry to this country as a nonimmigrant or otherwise," explaining that this doctrine is rooted in the core notion of national sovereignty (id. at 765, quoting Gov't Br. at 20; emphasis added):

> In accord with the ancient principles of nation-states, the Court in The Chinese Exclusion Case, 130 U.S. 581, 609 (1889), and in Fong Yue Ting v. United States, 149 U.S. 698 (1893), held broadly * * * that the power

> to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers -- a power to be exercised exclusively by the political branches of government . . . ."

Finally, the Court has only recently recapitulated and reaffirmed this "entry doctrine" established by earlier cases: "[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." Landon v. Plasencia, 459 U.S. 21, 32 (1982).

It is undisputed that the Haitian petitioners in this case have not been admitted into the United States and fall within the category of "excludable" aliens (J.A. 160, 210). __/ Accordingly, under the settled principles discussed above, they are "'excludable' aliens who are not within the protection of the Fifth Amendment." Kwong Hai Chew v. Colding, 344 U.S. at 600. They thus have "no constitutional rights regarding [their] application[s]" for admission. Landon v. Plasencia, 459 U.S. at 32.

2. This Court's decisions establish beyond question that the Due Process Clause does not augment the rights available to excludable aliens under congressionally sanctioned procedures regarding the determination of admissibility or denial of entry. At the outset of their argument, however, petitioners attempt to sidestep the thrust of these governing precedents by stating the question presented in inflammatory terms and

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__/ The physical presence of class members within the boundaries of the United States does not alter their status in this regard. The Court has long recognized that an unadmitted excludable alien's legal status is not affected by his physical presence within the territorial boundaries of the United States; "he is treated as if stopped at the border" (Mezei, 345 U.S. at 215). See also Leng May Ma v. Barber, 357 U.S. at 188; Nishimura Ekiu v. United States, 142 U.S. at 661; 8 U.S.C. 1182(d)(5)(A) (grant of parole "shall not be regarded as an admission of the alien"); 8 U.S.C. 1223(a) (removal of alien from vessel or aircraft for examination by immigration official "shall not be considered a landing").

misrepresenting the holding of the court of appeals. Contrary to petitioners' submission (Br. 25-29), the question presented here assuredly is not whether "excludable aliens are 'persons' protected by the Fifth Amendment" (id. at 25). Nor was the court of appeals confused on this score, as petitioners charge (id. at 27).

The court of appeals correctly recognized that the question whether excludable aliens are "persons" within the meaning of the Fifth Amendment simply is not at issue. The court below acknowledged that "there are certain circumstances under which even excludable aliens are accorded rights under the Constitution" (J.A. 317), citing as examples constitutional protections granted criminal defendants and the right to compensation for governmental taking of property located within the United States (id. at 318-319). The court of appeals explained that excludable aliens can raise such "constitutional challenges to deprivations of liberty or property" because they arise "outside the context of entry or admission, when the plenary authority of the political branches is not implicated" (id. at 317-318; see also id. at 319-320). There is no reason to consider in this case the extent of constitutional protection available to excludable aliens in contexts removed from immigration proceedings that govern or affect their entry into the United States. As the court of appeals understood, this case must be decided on far narrower and more specific grounds: whether the requirements of due process under the Fifth Amendment enlarge excludable aliens' procedural and substantive rights in the exclusion process, beyond those provided by statute, administrative rule and practice.

Viewed in this correct focus, the precisely stated holding of Mezei cannot be averted here (345 U.S. at 212, quoting 338 U.S. at 544): "'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" As the Court's language clearly indicates, Mezei

does not suggest that excludable aliens are not persons in contemplation of law. Rather, it is carefully directed at the constitutional rights of such persons regarding their exclusion and related detention. Indeed, even in the exclusion context Mezei does not in arbitrary fashion simply bar assertion of constitutional rights by excludable aliens. Instead, the Court concluded that, because of the plenary authority of the political branches to establish terms and conditions under which aliens may be received into our Nation's midst, the requirements of due process simply have no content in this context apart from the rights granted by Congress. See Landon v. Plasencia, 459 U.S. at 32. Accordingly, petitioners' vigorous efforts to establish that excludable aliens are "persons" within the Fifth Amendment are directed at a straw man. Plainly it is petitioners and not the court of appeals who have "confused the fact that all 'persons' such as the Haitian petitioners are covered by the Fifth Amendment, with the extent of the reach of their constitutional protection in differing contexts" (Pet. Br. 27). __/

__/ Petitioners' claim (Br. 28-29) that the cases we rely on do not establish that they are not persons within the meaning of the Fifth Amendment is thus simply beside the point. Conversely, the cases on which petitioners rely to establish the legal status of excludable aliens as persons within the contemplation of the law (Pet. Br. 25-27) are inapposite. None of these cases addresses the rights of excludable aliens to challenge on Fifth Amendment grounds the decisions of the Legislative and Executive Branches respecting their admission to the United States.

For instance, Plyler v. Doe, 457 U.S. 202 (1982), addresses the rights of persons who have entered the United States -- albeit illegally -- with regard to discriminatory action by states, which do not have constitutional responsibility for immigration matters. The very passage cited by petitioners (Br. 25) is carefully addressed to persons "presen[t] in this country" and rests directly upon the distinction recognized in Mezei between unadmitted aliens and those who are present, even illegally, in the United States. Id. at 210. Petitioners' reliance on Mathews v. Diaz, 426 U.S. 67, 77 (1975), a case addressed to rights of resident aliens in a context wholly unrelated to administration of the immigration laws, is misplaced for the same reason. As the court of appeals noted (J.A. 318-320 & n.22), Wong Wing v. United States, 163 U.S. 228 (1896), likewise addresses the rights of a resident alien regarding criminal prosecution. That case explicitly distinguishes between the exclusion and criminal prosecution contexts in holding constitutional protection available to aliens in the latter situation. 163 U.S. at 237. Yick Wo v. Hopkins, 118 U.S. 356 (1886), again addresses the rights of resident aliens, and is unrelated to enforcement of the immigration laws.
(Continued)

3. In another effort to parry the thrust of the entry doctrine cases petitioners assert that "even congressional and presidential decisions concerning the admission of aliens are subject to constitutional scrutiny" (Pet. Br. 36). Again petitioners serve up a smorgasboard of authorities directed at other issues while adducing none that is pertinent here. See also page 31 note , supra.

Petitioners' reliance on The Chinese Exclusion Case is misplaced. Although the Court there indicated that the "sovereign power[]" to "admit subjects of other nations to citizenship" was subject to any restraint imposed by "the Constitution itself" (130 U.S. 604), it concluded that the Constitution imposes no restraint upon the authority of Congress

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Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931), addresses only the obligation of the United States to pay just compensation to an alien corporation when it takes property located within the United States; in any event, the Court ultimately concluded in that case that there was statutory authorization for payment of just compensation. See id. at 489-492. Reid v. Covert, 354 U.S. 1 (1957), addresses only the rights of United States citizens. Finally, Balzac v. Porto Rico, 258 U.S. 298 (1922), considers only whether the Sixth Amendment right to jury trial applies in Puerto Rico. Applying the doctrine of the Insular cases (Downes v. Bidwell, 182 U.S. 244 (1901), Hawaii v. Manchiki, 190 U.S. 197 (1903), and Dorr v. United States, 195 U.S. 138 (1904)), the Court determined that Puerto Rico did not have the status of an incorporated territory and that the Sixth Amendment jury trial guarantee accordingly was unavailable to a criminal defendant. Petitioners quote out of context (Br. 26) the Court's statement that the "Constitution of the United States is in force * * * whenever and wherever the sovereign power of that government is exerted." They ignore, however, the holding of Balzac, which undermines their position. They also neglect the Court's reconciliation of its holding with its acknowledgment that the Constitution "applies" in Puerto Rico (258 U.S. at 312):

> The Constitution, however, contains grants of power, and limitations which, in the nature of things, are not always and everywhere applicable, and the real issue in the Insular Cases was not whether the Constitution extended to the Philipines or Porto Rico when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power * * *.

The entry doctrine is completely consistent with this view of the Constitution. In the end, petitioners are unable to cite any decision of any court that recognizes rights such as they claim in a situation comparable to this case. See Resp. Br. in Opp. 20-21; compare Pet. Br. 26 n.31.

to exclude a class of aliens based on their national origin, and that the determination of the Legislative Branch as to the "necessity" of any such classification is "conclusive upon the judiciary" (id. at 606). Petitioners' citation of Hampton v. Mow Sun Wong, 426 U.S. 88, 101-103 (1976), is likewise unavailing. Although the Court referred in passing to the availability of "narrow judicial review" with respect to the exercise of "the power over aliens" (id. at 101-102 n.21), the case was addressed only to the rights of resident aliens with regard to administratively imposed citizenship requirements for federal employment. In this context, wholly unrelated to admission or immigration, the Court merely held that "federal power over aliens" is not "so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens" (id. at 101). __/

Petitioners also rely on the following language in Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977): "Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens * * *." This statement is unaccompanied by any citation of supporting precedent. In any event, read in context Fiallo suggests only that classifications respecting aliens are subject to judicial review -- albeit of a highly deferential nature -- when those classifications directly affect the rights of citizens or resident aliens who are proper parties to the litigation.

Fiallo involved a Fifth Amendment equal protection challenge to provisions of the immigration laws that extended special

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__/ Korematsu v. United States, 323 U.S. 214 (1944), and the other cases cited by petitioners (Br. 36) are inapposite here as well, for they address only the rights of United States citizens and have no bearing on the special question of the extrastatutory rights of excludable aliens in the admission and parole contexts. In any event, as we have explained (pages 29-31) the entry doctrine does not rest on any view that excludable aliens are not persons, or that the Constitution simply does not apply to such persons.

preference immigration status to an illegitimate child of a female United States citizen or lawful permanent resident alien, but denied a similar preference to an illegitimate child of a citizen or resident father. Applying the exceedingly deferential standard of review announced in Kleindeinst v. Mandel, supra, the Court concluded that the legislative classification should be sustained because it was based on a "'facially legitimate and bona fide'" policy decision by Congress, as to which the courts possess "no * * * authority to substitute [their own] political judgment" (430 U.S. at 794, quoting 408 U.S. at 770; 430 U.S. at 798). The Court remarked that "it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision" (id. at 799 (footnote omitted)), and it refused to reweigh competing policy considerations or assess the comparative merit of alternative policies, stating that the "decision not to accord preferential status to this particular class of aliens * * * remains one 'solely for the responsibility of the Congress and wholly outside the power of this Court to control'" (430 U.S. at 799, quoting Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

To be sure, in Fiallo the Court turned aside the government's threshold suggestion that the challenged statutory provisions were wholly exempt from judicial scrutiny. 430 U.S. at 793 n.5. But Fiallo itself presented a claim of discrimination allegedly "infring[ing] upon the due process rights of citizens as legal permanent residents" and "implicat[ing] 'the fundamental constitutional interests of United States citizens and permanent residents'" (id. at 794, quoting Appellant's Br. at 53-54; see also 430 U.S. at 798). Indeed, the plaintiffs in Fiallo included citizens or resident aliens who sought to invoke a preference status on behalf of their children or parents, notwithstanding the illegitimate status of the relationship involved. 430 U.S. at 790. Thus the case did not involve only the rights of unadmitted aliens.

Accordingly, in Fiallo the Court simply had "no occasion to consider * * * whether there may be actions of the Congress with respect to aliens that are so essentially political in character as to be nonjusticiable" (430 U.S. at 790). __/ Nothing in Fiallo -- which emphatically refused to depart from past precedents governing the proper relationship of the courts to the political branches of government respecting admission-related determinations and classifications (see id. at 792-793 n.4) -- indicates that the Court has abandoned or qualified the entry doctrine. Because the claim presented in this case entails only the alleged violation of the due process rights of excludable aliens, Fiallo provides no support for petitioners' contentions.

B. The Entry Doctrine Bars Petitioners' Challenge to the Denial of Parole Pending Exclusion Proceedings

1. Petitioners contend (Br. 31-35) that the principles of the entry doctrine do not, in any event, govern this case because they invoke the Fifth Amendment not with respect to their applications for admission but, instead, with respect to their applications for parole from detention pending a determination of

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__/ This view of the case is corroborated by the Court's reliance (430 U.S. at 794-795) on Kleindeinst v. Mandel. The Fiallo plaintiffs had argued that because the rights of United States citizens or residents were implicated, the Court should apply a less deferential standard of review than that employed in Mandel. The Court responded that Mandel also had concerned an alleged infringement of citizens' rights (under the First Amendment). 430 U.S. at 794. Of course Mandel itself makes clear that excludable aliens "personally" enjoy no constitutional rights respecting entry to the United States (408 U.S. at 762). It was only because the Court concluded that the citizen-plaintiffs there had asserted a non-frivolous claim that their own First Amendment rights were infringed by the alien plaintiff's exclusion (id. at 762-765) that the Court proceeded to consider whether "a facially legitimate and bona fide" (id. at 769, 770) justification had been adduced for the aliens' exclusion (compare id. at 762 with id. at 765-770). Indeed, even in this context, the Court reserved rather than rejected the government's contention that the justification for excluding the alien was wholly beyond judicial review. Id. at 769, 770.

Thus the Fiallo Court's detailed and explicit reliance on Mandel, coupled with its unexplained reference to prior cases said to establish the availability of limited judicial review in the admission's context, strongly suggests that the narrow right of judicial review recognized does not extend beyond cases where the constitutional rights of United States citizens or residents are implicated.

admissibility. The court of appeals correctly rejected this contention (J.A. 311-317).

a. The statutory command to detain "for further inquiry" every alien not "clearly and beyond a doubt entitled to land" (8 U.S.C. 1225(b)), which implements the Nation's plenary authority to exclude aliens, and the statutory grant to the Attorney General of discretionary authority to parole unadmitted aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest" (8 U.S.C. 1182(d)(5)(A)), are inextricably interrelated both in legal and practical terms. The availability of parole in appropriate cases "is simply a device through which needless confinement is avoided while administrative proceedings are conducted." Leng May Ma v. Barber, 357 U.S. at 190. Where appropriate, parole thus serves, in practical effect, to moderate the rigor of the rule that freely permits detention of unadmitted aliens pending exclusion proceedings. The discretionary authority to grant or withhold parole is, moreover, inextricably bound up with the inherent sovereign authority to exclude and detain aliens. Indeed, the Attorney General's discretionary parole authority may be exercised only with respect to an "alien applying for admission to the United States" (8 U.S.C. 1182(d)(5)(A)) and cannot realistically be viewed in isolation from the authority to exclude and detain, of which it is but an outgrowth. __/

__/ All of the petitioners are, by definition of their certified class, excludable aliens "who are applying for entry into the United States" (J.A. 176). We note that the only basis for admission suggested by petitioners during the course of this litigation is their desire to be granted asylum in this country. If the Attorney General determines that an alien is a "refugee" within the meaning of 8 U.S.C. 1101(a)(42)(A), the alien may be granted asylum, released from custody and allowed to be physically at large within the United States. An application for asylum will be treated as a request for withholding of exclusion under 8 U.S.C. 1253(h) and will cause the exclusion proceeding to be adjourned. See 8 C.F.R. 208.3(b); 208.10(b). Indeed, an exclusion proceeding that has already been concluded may be reopened on the basis of a request for asylum. 8 C.F.R. 208.11.

Petitioners, however, seize upon the established rule that parole from detention pending a determination of admissibility does not effect an entry into the United States in contemplation of law, see Leng May Ma, 357 U.S. at 190, and argue that judicial review of parole decisions on extrastatutory grounds accordingly would not "interfere with the power of Congress and the President to determine admission questions" (Pet. Br. 32). While we agree with petitioners' predicate, it does not support their sophistic conclusion. Of course granting parole would not deprive the Attorney General of the legal authority to revoke parole. But the cases that hold that a paroled alien acquires no legal rights respecting admission above and beyond one who stands (in fact as well as in law) outside the United States plainly do not suggest that such a person has extrastatutory rights to parole.

More to the point, the practical effect of a de facto admission through parole is not appreciably different from that of a formal legal admission. As the court of appeals observed (J.A. 316), parole of an alien into the United States "permit[s] the physical entry of the alien into the midst of our society and implicates many of the same considerations -- such as employment and national security concerns -- that justify restrictions on admission." __/ And as the court of appeals further noted, although a grant of parole is "subject to certain restrictions

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__/ We are somewhat mystified by petitioners' unexplained assertion that "[t]he word 'parole' has two entirely separate meanings in immigration law," suggesting that this case involves only "temporary parole" as distinguished from some other supposed kind of non-temporary parole (Pet. Br. 6 n.10; see also id. at 43 n.51). It may be that petitioners allude only to the duration of the parole involved. Alternatively petitioners may employ the label temporary parole to distinguish parole from the admission of refugees who are, but for their refugee status, ineligible for admission. See page ____ note ___, supra. Admission of aliens determined to be eligible for asylum is now governed by 8 U.S.C. 1157-1159 and is not properly regarded as parole. Although it appears that the Attorney General's parole authority was, prior to 1980, employed as an additional means of accommodating refugees (see INS v. Stevic, No. 82-973 (June 5, 1984), slip op. 7), Section 203(f) of the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 107, added the provisions now found in 8 U.S.C. 1182(d)(5)(B) that strictly limit the use of parole as a substitute for admission of an alien as a refugee.

and is theoretically of a short-term character," the "reality can be quite different," for "an alien with a skilled attorney can delay the exclusion process for years" (J.A. 315-316 & n.20). More telling still, paroled "aliens who choose to abscond face only a minimal risk of apprehension" (id. at 316 n.20). Thus, the availability of parole may have a corrosive effect on the government's plenary authority to exclude aliens (id. at 315 n. 18). This effect is especially debilitating of the government's lawful authority because allowance of parole may act as an inducement to persons ineligible for admission to seek to enter the United States. In fact, both the district court and the Eleventh Circuit have concluded that, prior to the 1981 shift in the government's parole and detention policy, precisely this phenomenon was operating with respect to Haitians seeking entry to this country (J.A. 119 n.17, quoting Haitian Refugee Center, Inc. v. Smith, 676 F.2d 1023, 1029 n.11 (1982)). __/

Accordingly, it is wholly unrealistic to suggest that the exercise of the Attorney General's parole authority may be subjected to extrastatutory constraints, inapplicable to the

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__/ Petitioners repeatedly assert (Br. 17-18, 22, 29-30) that the government had no legitimate basis for concern that their parole would adversely affect national security or that they were likely to abscond if released on parole. Petitioners misread the record in this regard and, in any event, have missed the critical point. It is true that the INS had not identified any reason to believe that Haitian aliens were more likely to abscond than other excludable aliens. But there is no doubt that the government did have reason to fear that paroled Haitians, like other paroled aliens, might abscond and become difficult or impossible to locate. For instance, paroled Haitians frequently failed to appear as required at INS hearings (Tr. 2398-2399). See also GAO Rep. 15 & n.4 (Haitian aliens failed to appear at more than 300 of the 500 cases scheduled for hearing between March 5, and May 28, 1981; 2,429 out of 3,311 appearances missed between February 18, and July 16, 1982).

Petitioners also misapprehend the nature of the national security concern posed by parole of large numbers of unadmitted aliens. The point is not that any one individual was a security risk. Rather, it was the specter of loss of effective control of the Nation's borders created by the accumulation of masses of unadmitted aliens presumptively ineligible for admission, coupled with the former policy of routine parole, that created an institutional threat to national well-being. See pages 40-41, infra. As the court of appeals observed (J.A. 314 n.16), "[a]ny broad conception of "national security" must surely include the ability to regulate entry into a country * * *."

admission process itself, without severely undermining the government's plenary authority to control entry of aliens. As Judge Learned Hand explained in Mezei, anticipating this Court's ruling, temporary parole "does give [an excludable alien] a privilege of entry" which, while "hedged about in various ways" enables him to "mingle with the mass of citizens." United States ex rel. Mezei v. Shaughnessy, 195 F.2d 964, 970-971 (2d Cir. 1952) (dissenting opinion). In short, if the entry doctrine were inapplicable to parole determinations, as petitioners submit, it would assuredly have the impermissible effect of displacing the properly "political decisions as to whom we will permit, even temporarily, to join our society" (Pet. Br. 35). _/ This is especially so where, as here, the President and Attorney General decided to implement a new restrictive parole policy precisely because they had determined that such a policy was necessary to maintain the efficacy of the Nation's sovereign authority to exclude aliens. See pages 3-5, supra. _/

b. In any event, this Court has expressly recognized that "detention or temporary confinement" is "part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens" (Wong Wing v. United States, 163 U.S. 228, 235 (1896)). "Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation" (ibid.). See also Carlson v. Landon, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this

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_/ Denial of parole is readily distinguishable from the hypothetical measures that troubled Justice Jackson in Mezei -- "eject[ing an alien] bodily into the sea or [setting] him adrift in a rowboat" (345 U.S. at 226) (dissenting opinion). In contrast to these unlikely hypotheticals, simple confinement of an unadmitted alien pending determination of admissability is "ancillary to exclusion" (id. at 227).

_/ As the court of appeals pointedly observed (J.A. 322-323), if an excludable alien could challenge a decision of the political branches to deny him parole, a hostile foreign leader could manipulate our immigration system in a manner that "would ultimately result in our losing control over our borders."

deportation procedure. Otherwise aliens arrested for deportation would have the opportunity to hurt the United States during the pendency of deportation proceedings"); Palma v. Verdeyen, 676 F.2d 100, 104 (4th Cir. 1982).

Moreover, as the court of appeals observed (J.A. 311-313), this Court's decision in Mezei is directly on point. There, the Court held that the Fifth Amendment afforded an excludable alien no right to be allowed temporary physical entry into this country. The issue presented was "whether the Attorney General's continued exclusion of respondent without a hearing amounts to an unlawful detention, so that courts may admit him temporarily to the United States on bond until arrangements are made for his departure abroad" (345 U.S. at 207). Because Mezei did not challenge the government's power to exclude him but sought only release pending implementation of the exclusion order, this Court's decision, as the court of appeals recognized, "did not concern admission or exclusion per se, but the rights of an alien when challenging his continued detention pending the enforcement of an exclusion order that had been entered against him" (J.A. 312). It follows, then, that the holding of Mezei denying extrastatutory rights to excludable aliens is not restricted to frontal challenges to denial of the right to enter. Rather, under Mezei the entry doctrine also forecloses efforts to litigate the propriety of denial of interim parole.

2. Petitioners also argue (Br. 35) that even if parole determinations are conceded in the abstract to be sufficiently related to the political branches' unreviewable authority over admission itself, extrastatutory judicial review of the former may not be foreclosed under the entry doctrine unless it is demonstrated that the authority to exercise parole discretion in a discriminatory manner is equally initimately bound up with the unreviewable political concerns entrusted exclusively to the Legislative and Executive Branches. Petitioners' argument is fallacious: it would effectively circumvent the entry doctrine

by requiring any nationality-based distinctions among classes of aliens employed by the Attorney General in exercising his parole authority to pass judicial scrutiny in order to demonstrate that no such scrutiny is warranted.

Furthermore, petitioners' formulation is inconsistent with Mezei itself, which teaches that the entry doctrine extends to procedural claims as well as foreclosing any claims of a substantive right to enter. Petitioners press an equal protection claim that they portray as analytically distinct from any assertion of a substantive right to parole. Granting parole to class members, they suggest, would merely be a remedy for a kind of collateral wrong they have allegedly suffered: discrimination in the administration of parole. But Mezei, too, arguably had a discrete constitutional claim (sounding in procedural due process) that could have been distinguished analytically from any assertion of a substantive right to parole -- i.e., that he had been excluded without a hearing in violation of due process and accordingly should be judicially paroled (345 U.S. at 207). Nevertheless, in extending the entry doctrine to bar even Mezei's claim for parole, the Court in Mezei did not deem it necessary to determine that the reasons for denying parole without a hearing were sufficiently compelling and sufficiently related to sovereign prerogatives to preclude judicial review. Compare 345 U.S. at 217-218 (Black, J., dissenting); id. at 224-228 & n.9 (Jackson, J., dissenting). Instead, the Court simply remarked that because Mezei was an "entrant alien," the "Attorney General [could] lawfully exclude [him] without a hearing as authorized by emergency regulations promulgated under the Passport Act." (id. at 214-215).

Thus Mezei forecloses petitioners' contention that the government must justify the withholding of extrastatutory judicial review of the particular claim that an alien seeks to raise in challenging the denial of parole. Indeed, as Justice

Jackson's dissent makes clear (345 U.S. at 224-228), because Mezei could have been afforded (at the government's election) a hearing, rather than parole, as a remedy, his claim was not intimately bound up with the power to exclude; petitioners' due process claim, by contrast, effectively asserts a substantive right of entry. Justice Jackson, of course, agreed that unadmitted aliens have no such right. Id. at 222-224.

The most compelling reason for foregoing the extra inquiry proposed by petitioners lies in the nature of the remedy they seek based on their claim of unlawful discrimination: release from detention. Notwithstanding the arguably discrete character of the denial of procedural rights challenged in Mezei, the fact remained that to admit Mezei as a sanction for that denial would have "nullifie[d] the very purpose of the exclusion proceeding," impermissibly negating the decision of the political branches that parole should not be available to Mezei. 345 U.S. at 216. The situation regarding petitioners' claim is not essentially different. Notwithstanding the claimed discrimination, extension of parole to petitioners as a remedy is impermissible because the courts simply lack authority to admit excludable aliens to the United States on terms inconsistent with the statutory delegation of authority to the Attorney General. Cf. INS v. Miranda, 459 U.S. 14, 19 (1982); INS v. Hibi, 414 U.S. 5 (1973). __/ Under the entry doctrine, the bar to judicial review importing extrastatutory criteria lies not in the nature of the right

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__/ Contrary to petitioners' suggestion (Br. 24 n.28), even the strong policy against discrimination reflected in many aspects of our law does not invariably override powerful countervailing policies that would limit the availability of remedies to persons claiming to have suffered unconstitutional discrimination. See, e.g., Chappell v. Wallace, No. 82-167 (June 13, 1983).

asserted, but in the unavailability of the remedies that they seek. __/

3. Petitioners attempt (Br. 40-43) to distinguish Mezei on a variety of narrow factual grounds. These efforts are unpersuasive.

a. Petitioners contend (Br. 40-43) that this case is distinguishable from Mezei because there the excludable alien sought parole after he was already subject to a final order of exclusion, whereas here the excludable Haitian aliens who challenge their detention have not yet been issued final exclusion orders and are being detained pending a determination of admissibility. But petitioners do not offer any reason why this distinction should alter the outcome. As we have already explained (pages 35-40), the power to detain unadmitted aliens pending a determination of admissibility is a necessary adjunct of the plenary power to exclude those who will ultimately be found inadmissible under the applicable statutory standards. If anything, the factual comparison between this case and Mezei suggests that Mezei's claim was more compelling than that of petitioners. Mezei was already under a permanent exclusion order and was being detained preparatory to deportation, but no other country was willing to admit him. The detention that he challenged thus was indefinite in duration. 345 U.S. at 208-209. By contrast, petitioners are merely being detained pending the completion of their exclusion hearings--and resolution of

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__/ The inappropriateness of judicially-mandated parole as a remedy for discrimination in exercise of parole authority is especially clear on the record of the present case. Petitioners' claim in this Court is in substantial measure that field-level INS personnel administered a neutral national policy intended sharply to restrict the availability of parole to alien entrants of all nationalities in an unauthorizedly underinclusive fashion, with the result that Haitians were differentially affected. See pages 18-19, supra. That some excludable aliens may have been improperly allowed parole does not justify refusal to enforce against others the deliberately established Executive policy restricting parole. See Heckler v. Mathews, No. 82-1050 (Mar. 5, 1984), slip op. 9-10.

asylum claims that they have themselves made--and there will be no impediment to their return to their country of origin upon completion of those proceedings in those instances where a final order of exclusion is entered. On the other hand, any class members that demonstrate admissibility will in due course be admitted. No legally cognizable hardship arises from the requirement that petitioners be denied entry to the United States until their right thereto has been properly established in appropriate proceedings.

b. Petitioners also seek (Br. 43) to distinguish Mezei on the ground that no statutory authority then existed for granting parole to an excludable alien (see 345 U.S. at 216 nn.14-15), whereas the Attorney General has now been vested with parole authority under 8 U.S.C. 1182(d)(5)(A). Again, this is a distinction without a difference. Petitioners do not explain how the existence of statutory parole authority could affect the constitutional analysis embodied in Mezei. To be sure, the Court in Mezei commented that the then newly enacted 8 U.S.C. 1182(d)(5) was "not now" before it. 345 U.S. at 216 n.14. But this comment merely explained the Court's statement that statutory authority for Mezei's parole was lacking (id. at 216) and provides context for its holding that Mezei's detention did not deprive him of "any statutory or constitutional right" (id. at 215; emphasis added). The most that can be said in this respect is that Mezei leaves open the question whether the Attorney General's exercise of his statutory parole discretion may be reviewed under some nonconstitutional abuse of discretion standard or for consistency with the applicable statutory policy. __/ The availability of parole pursuant to statute plainly affords no reason to question the rule that Congress has

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__/ Of course, the court below held that such nonconstitutional review is available. See pages 13-14, 17-18, supra.

complete authority to establish procedures and standards governing entry and parole of aliens into the United States.

c. Petitioners also appear to suggest (Br. 42 & n.49, 46) that Mezei is distinguishable as a Cold War relic involving national security concerns and that the entry doctrine is similarly limited in reach. This Court rejected a virtually identical contention in Fiallo v. Bell, 430 U.S. at 796. There the plaintiffs sought to distinguish the Court's "prior immigration cases as involving foreign policy matters and congressional choices to exclude or expel groups of aliens that were 'specifically and clearly perceived to pose a grave threat to the national security' * * * 'or to the general welfare of this country.'" The Court pointedly disagreed in terms that foreclose petitioners' arguments here (430 U.S. at 796):

> We find no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue.

In any event, as we have discussed (pages 37-39) this case, too, implicates the authority of the government to act regarding matters vital to the general welfare of the country and its security. The Court has long recognized that the authority of the political branches to control our borders and determine who shall enter into our midst is a fundamental attribute of sovereignty and that the existence of this authority does not depend on any judicial appraisal of the gravity of the situation confronting the Nation. The Court explained in The Chinese Exclusion Case, 130 U.S. at 606, that the exclusion power of the political branches is appropriately addressed to "aggression and encroachment" from abroad, whether in the form of "the foreign nation acting in its national character," as in the event of war, or simply in the form of "its people crowding in upon us." The Court added that "the same authority which adjudges the necessity [of exercise of exclusion authority] in one case must also determine it in the other. In both cases its determination is

conclusive upon the judiciary" (ibid.; emphasis added). See also Harisiades v. Shaughnessy, 342 U.S. at 588-590.

d. Ultimately, perhaps dispairing of distinguishing this Court's pertinent decisions, petitioners ask the Court to overrule these authorities (Pet. Br. 23, 40, 44-46). In support of this venturesome request petitioners intimate (Br. 45) that "recent developments have eviscerated Mezei's rationale." _/ But as we have demonstrated (Br. 27-29), Mezei marks no departure from the consistent thread of this Court's teachings regarding the protections afforded to unadmitted aliens. Moreover, the "assumptions" that in petitioners' view underlie Mezei and that are further said no longer to be valid in fact either retain undiminished vitality or else never formed any part of the entry doctrine.

Contrary to petitioners' assertions, the entry doctrine does not rest on the simplistic notion that any class of governmental action is exempt from otherwise applicable constitutional restraints, nor on any doctrine that excludable aliens are not persons in the eyes of the law, nor on any doctrine respecting the geographical reach of the Constitution's provisions. Instead, the rule rests firmly on principles of sovereignty, the doctrine of separation of powers, and the conclusion that the only content that may be assigned to the concept of due process in the context of regulating the entrance of aliens into this Nation is that which Congress provides. Thus, as we have explained (pages 27-37), the unreviewability under the Fifth

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_/ Petitioners also seek to discredit Mezei by asserting, incorrectly, that a plurality of the Court subsequently "strongly suggested disapproval of Mezei's extreme position when it stated that the decision created an 'intolerable situation'" (Pet. Br. 45, citing Trop v. Dulles, 356 U.S. 86, 102 n.36 (1958)). Examination of that plurality opinion, however, reveals that the reference to an "intolerable situation" was merely intended to describe the unenviable position in which Mezei found himself when he was determined to be excludable but remained in indefinite detention because no other country would admit him.

Amendment of exclusion decisions affecting only the rights of unadmitted aliens remains the law today.

Petitioners' argument, at bottom, asks the Court simply to discard its past precedents in favor of a new doctrine petitioners believe to comport better with desirable policy. This the Court has refused to do. Rather, its decisions "confirm th[e] view" that "an alien seeking initial admission to the United States * * * has no constitutional rights regarding his application" (Landon v. Plasencia, 459 U.S. at 32). Indeed, the Court has at least twice in recent times declined to reconsider the doctrines on which we rely. Fiallo v. Bell, 430 U.S. at 792-793 & n.4; Kleindienst v. Mandel, 408 U.S. at 765-767. On each occasion the Court adopted Justice Frankfurter's exposition of the reasons why stare decisis applies with unique force in this context. Writing on a closely related issue in Galvan v. Press, 347 U.S. 522, 530-531 (1954), Justice Frankfurter stated that "the slate is not clean. As to the power of Congress under review there is not merely a 'page of history,' but a whole volume" (ibid.; citation omitted). Justice Frankfurter stated that the doctrine of exclusive political control over matters involving entry of aliens "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government," and added: "We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors" (ibid.). Petitioners have failed to offer a sufficient reason why the Court should suddenly abandon this well-settled precept of immigration law. _/

_/ Petitioners' reliance on Justice Jackson's dissent in Mezei, said to articulate views "more consonant with modern constitutional doctrine" (Pet. Br. 46), is in any event factually unwarranted. The key to Justice Jackson's disapproval of the result in Mezei was that there the excludable alien was, because of the impossibility of effectuating deportation, effectively detained indefinitely. 345 U.S. at 227. Here, unlike Mezei, detention is not "indefinite" or an "end in itself"; rather it is "ancillary to exclusion," and "can be justified as a step in the process of turning [petitioners] back to the country whence [they] came" (if

(Continued)

C. Because Nationality Distinctions Are Inherently Permissible In The Formulation And Application Of The Immigration Laws, Restriction Of Judicial Review Under The Entry Doctrine Is Especially Appropriate Here

1. In this case petitioners seek to press an equal protection claim; they assert (Br. 30, 35, 42-43) that the gravamen of their claim takes it outside the reach of the entry doctrine. We have already explained (Br. 42-44) that the nature of the claim presented here provides no basis for distinguishing this Court's precedents and cannot serve to reconcile the relief demanded -- judicially directed release of unadmitted aliens into the United States -- with the plenary authority of Congress and the Executive to determine whether an alien should be allowed to enter this country. But an equally compelling reason for rejecting petitioners' contentions lies in the unique footing upon which nationality distinctions applicable to immigration and naturalization matters stand. Significantly, even outside the present context -- admission and de facto admission decisions affecting only excludable aliens, where notions of sovereignty and separation of powers dictate maximum judicial deference -- such nationality distinctions are not subject to the standards that would ordinarily govern scrutiny of nationality distinctions under the Fourteenth Amendment Equal Protection Clause.

a. To be sure, this Court has held that the Fifth Amendment's Due Process Clause includes an equal protection component. See Bolling v. Sharpe, 347 U.S. 497 (1954). In some contexts, this component requires an analysis similar to that conducted in cases involving the Equal Protection Clause of the Fourteenth Amendment. See, e.g., Buckley v. Valeo, 424 U.S. 1, 93 (1976). But the Court has recognized that

> the two protections are not always coextensive. Not only does the language of the two

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they are ultimately denied admission). Ibid. Moreover, petitioners, unlike Mezei, cannot conceivably be said to have been "entrapped into leaving the other shore by reliance on a visa which the Attorney General refuses to honor" (ibid.). See also page 39 note ___, and pages 41-42, supra.

> Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.

Hampton v. Mow Sun Wong, 426 U.S. at 100 (footnote omitted). Specifically, "the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." Mathews v. Diaz, 426 U.S. 67, 87 (1976). Indeed, in the immigration context, the government "regularly makes rules that would be unacceptable if applied to citizens" (id. at 80). Among these are the rules governing exclusion of aliens. Ibid.

Even aliens who have been admitted to the United States do not enjoy protection against official federal "discrimination within the class of aliens" comparable to that provided by the Fourteenth Amendment (Diaz, 426 U.S. at 80). Because decisions respecting relations between the United States and aliens "may implicate our relations with foreign powers," and because "a wide variety of classifications must be defined in light of changing political and economic circumstances," the Court explained in Diaz that a "rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution" (426 U.S. at 81). These matters, the Court acknowledged, are "frequently of a character more appropriate to either the Legislative or the Executive than to the Judiciary." Ibid.

In Diaz, the Court upheld the restriction of Medicare eligibility to aliens who had been admitted for permanent residence and had resided in the United States for at least five years. The Court determined that that neither requirement was "wholly irrational." 426 U.S. at 83. Diaz was followed by Fiallo v. Bell, supra, which rejected an equal protection attack on sex and illegitimacy classifications in the immigration law.

The Court found that the classifications were "facially legitimate and bona fide," declining the plaintiffs' invitation to weigh the policy justifications for the classifications or to consider the availability of alternatives (430 U.S. at 794, 798-799). In short, classifications of this kind -- presumptively suspect in other contexts -- are permissible as to aliens, even outside the admission context, so long as they are not "wholly irrational" (Diaz, 426 U.S. at 83).

b. Because the subject matter of immigration law necessarily implicates the relationship of the United States with aliens and foreign countries, nationality-based classifications are precisely the kind of classifications respecting aliens that are entirely legitimate. Indeed, it is difficult to imagine that any sovereign nation would disable itself from taking nationality into account in dealing with aliens or in promulgating its immigration code.

In the immigration field, Congress has repeatedly drawn distinctions on the basis of national origin. Indeed, Congress historically imposed a nationality-based quota system on the issuance of immigrant visas. Prior to 1965, each foreign country had a specified immigration quota. Compare 8 U.S.C. (1964 ed.) 1151 (nationality-based quota system) with 8 U.S.C. 1151 (1982) (worldwide numerical limitations). And it could not seriously be suggested that the immigration quota system was unlawful, or even that the courts had any authority to assess the basis for these classifications. The Attorney General also has long drawn distinctions among aliens on the basis of nationality, and Congress has not disturbed this administrative practice. See, e.g., Saxbe

v. Bustos, 419 U.S. 65 (1974). _/ The courts have consistently recognized the validity of these classifications. __/

Nationality-based classifications among aliens in the framing and implementation of the immigration laws typically arise from deliberate decisions of our Nation's political branches made in response to the actions of other nations that affect our vital interests or otherwise engage our sovereign prerogatives. For instance, the Court in Diaz observed that the plaintiffs, Cuban parolees, were "but one of several categories of aliens who have been admitted in order to make a humane response to a natural catastrophe or an international political situation" under a legal regime that permits "flexibility in policy choices" (426 U.S. at 81). This latitude must exist whether the actions determined to be necessary by competent political authority enlarge or restrict the privileges of aliens. It can scarcely be doubted that the various administrative initiatives taken with respect to Iranian nationals in response to the occupation of this Nation's embassy in Teheran (see page 51 note , supra) served the most

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__/ See also 8 C.F.R. 101.1 (presumption of lawful admission for certain national groups); 8 C.F.R. 212.1 (documentary requirements for nonimmigrants of particular nationalities); 8 C.F.R. 231 (arrival-departure manifests for passengers from particular countries); 8 C.F.R. 242.2(e) (nationals of specified countries entitled to special privilege of communication with diplomatic officers); 8 C.F.R. 252.1 (relaxation of inspection requirements for certain British and Canadian crewmen).

__/ See, e.g., Malek-Marzban v. INS, 653 F.2d 113 (4th Cir. 1981) (amendment to rule on voluntary departure to reduce the time allowed for Iranian nationals); Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980) (INS directive revoking deferred departure dates for Iranian nationals); Narenji v. Civiletti, supra (regulation requiring Iranian students to report on their current status); Noel v. Chapman, 508 F.2d 1023, 1028 (2d Cir.), cert. denied, 423 U.S. 824 (1975) (alien relatives of resident aliens from Eastern Hemisphere given preference not applicable to alien relatives of Western Hemisphere resident aliens); Alvarez v. District Director of INS, 539 F.2d 1220 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977) (special status for commuter aliens only from Mexico and Canada); Dunn v. INS, 499 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1106 (1975) (one type of discretionary relief from deportation inapplicable to aliens from Western Hemisphere).

compelling national interests. Any rule restricting the use of nationality classifications might inhibit the ability of the Executive to exercise its discretion under the immigration laws to respond effectively to external factors such as that crisis, or Cuba's effort to foist its undesirable citizens upon this country at the time of the Mariel "boatlift," or Soviet actions that create streams of refugees (in Poland, Hungary, Czechoslovakia or Afghanistan), or the consequences of our own international engagements (e.g., the flood of refugees from Vietnam after the fall of Saigon). __/

c. It is accordingly clear beyond peradventure that Congress and the Executive have exceedingly broad authority to apply nationality classifications under the immigration laws. __/ Thus, even if the Court were prepared to reassess the doctrine of the entry cases, it would be particularly inappropriate to do so

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__/ As the court of appeals observed (J.A. 329 & n.30), the decisions of this Court make clear that, at least absent contrary statutory language (see, e.g., 8 U.S.C. 1152(a), prohibiting -- with stated exceptions -- specified forms of discrimination in issuance of immigrant visas), authority to draw nationality-based classifications generally is shared by Congress and the Executive. See Fiallo, 430 U.S. at 796; Diaz, 426 U.S. at 81-82; see also Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980). Here, of course, Congress has explicitly delegated to the Attorney General broad discretion to make determinations as to the availability of parole. 8 U.S.C. 1182(d)(5)(A). This grant of discretion necessarily includes the authority to draw nationality distinctions in the exercise of parole authority "for reasons deemed strictly in the public interest" (ibid.). See Diaz, 426 U.S. at 81; see also 8 U.S.C. 1182(f) (authorizing the President to suspend or condition the entry of "any aliens or any class of aliens" whose entry is deemed "detrimental to the interests of the United States"). Petitioners appear (Br. 36-39 & n.45) to concede the authority of the President and the Attorney General to draw such distinctions.

__/ Contrary to the assumption that pervades petitioners' brief (see, e.g., pages 8, 3, 22, 24 & n.28, etc.), this case does not present any question as to the constitutional restraints that may apply to racial classifications in the admission of aliens. As the court of appeals panel observed (J.A. 243 n.29), petitioner's evidence was in fact focused on nationality discrimination against Haitians. Moreover, whatever else may be said about the factual record in this case, it is clear that none of the evidence said to support petitioners' discrimination claim -- evidence that is rather selectively canvassed by petitioners in this Court (Pet. Br. 10-18) -- contains any suggestion that Haitians were classified for disparate treatment because they are black.

in the context of a challenge to the political branches' authority to recognize nationality classifications among aliens seeking to enter the United States. Petitioners evidently contend (Br. 36-39) that judicial review of nationality classifications -- even in this wholly "political" context -- should be governed by the standards articulated in Fiallo and Diaz (see pages 49-50, supra), rather than by the doctrine of the entry cases. The established rule regarding unadmitted aliens is, however, most faithful to separation of powers concerns and is supported by compelling policy considerations. __/

As the examples we have given (pages 51-52, supra) illustrate, the nationality classifications that are drawn from time to time in the Attorney General's exercise of parole discretion are precisely the kind of classifications that "must be defined in light of changing political and economic circumstances" and that are "more appropriate to either the Legislative or the Executive than to the Judiciary" (Diaz, 426 U.S. at 81). Extrastatutory review of the exercise of the Attorney General's parole discretion, even under a deferential standard, would undesirably "inhibit the flexibility of the political branches of government to respond to changing world conditions" (ibid.). The courts simply are not possessed of the requisite expertise or familiarity with international relations problems properly to evaluate the policy determinations of the

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__/ We note that any substantive difference between the two standards may be more apparent than real. Fiallo makes clear that the courts are in no event to become embroiled in judging the merits of the policy decisions of the Executive and Congress that classify aliens. 430 U.S. at 798-799. Such matters remain "'wholly outside the power of this Court to control'" (id. at 799; citation omitted). Indeed, the Court has not required that the author of the classification even articulate its justification. Ibid. ("Congress obviously has determined that preferential status is not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations" (emphasis added)). It is enough that the classification be stated and its rationality discernible.

political branches respecting nationality classifications that may be employed in the administration of parole authority. See Narenji v. Civiletti, 617 F.2d at 748, citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936):

> [I]t is not the business of the courts to pass judgment on the decisions of the President in the field of foreign policy. Judges are not expert in that field and they lack the information necessary for the formation of an opinion. The President on the other hand has the opportunity of knowing the conditions which prevail in foreign countries, he has his confidential sources of information and his agents in the form of diplomatic, consular and other officials.

In the final analysis there simply are no "judicially discoverable and manageable standards" for assessing the justifications for such nationality classifications (Baker v. Carr, 369 U.S. 186, 217 (1962)).

Any effort to inquire into the justifications for nationality classifications respecting unadmitted aliens would ultimately be sterile and burdensome to both the courts and the political branches. Such an inquiry would be sterile because of the sheer improbability of discovering an instance in which a wholly irrational nationality classification had been imposed. And it would be burdensome because of the fruitless imposition upon the courts, and because the opportunity for litigation itself would threaten to divert the energies and influence the conduct of responsible officials to whom discretionary authority to admit aliens is committed. See Nixon v. Fitzgerald, 457 U.S. 731, 751-753 (1982). Finally, in many instances, judicial review of the justifications for nationality classifications would intrude upon sensitive or confidential matters that are the subject of intergovernmental communications. See United States v. Mendoza, No. 82-849 (Jan. 10, 1984), slip op. 2.

In sum, the ability to establish needed classifications on short notice -- without pausing to satisfy the courts of their rationality or necessity -- may be an essential weapon in the

President's arsenal in dealing with an international crisis. There is simply no warrant for judicial oversight that may potentially be embarrassing to the United States' relations with other nations or detrimental to the Nation's ability to deal effectively in the international arena.

2. Assuming arguendo that petitioners' opportunity for parole was, contrary to the testimony of responsible high government officials, adversely affected by a nationality-based classification, there is no reason to doubt that such a classification would, given the circumstances that existed in 1981, meet any standard of rationality that might be applied to judge it. As we have explained (pages 2-5), in early 1981 this Nation was confronted with a serious and widespread breakdown in immigration enforcement. The Attorney General, acting on the counsel of a cabinet level task force, determined that in order to restore credibility and efficacy to our exclusion procedures it was necessary to adopt a new policy -- actually, to return to the pre-1954 policy -- of detaining unadmitted aliens stopped at the border who are unable to establish a prima facie claim for admission.

That policy was, as petitioners now concede, intended to be applied on a wholly non-discriminatory basis. At the same time, however, in putting the new policy into effect, it would have been entirely rational to take special administrative measures to assure efficient implementation in regard to Haitians. As the district court found, a prime example of the breakdown of prior parole policy was the presence in Florida of about 35,000 excludable Haitian aliens, whose numbers were daily being augmented by a "continuing flow of Haitians into South Florida" (J.A. 118-119, 130). The situation in South Florida was further aggravated by the arrival in that region in the spring of 1980 of 125,000 excludable Cuban aliens as part of the Mariel "boat-lift." The federal government had assigned a special

"Cuban/Haitian" entrant status for the Mariel Cubans and for the Haitians arriving by October 10, 1980, and aided in efforts to resettle them (J.A. 120). But, as the district court explained, "[t]he local communities were left with the task of providing jobs, housing, health care and food for the approximately 150,000 new residents of South Florida. This burden taxed local resources to their limits and continues to do so." Ibid.

In the circumstances, it would have been wholly rational to take special steps vigorously to implement the new detention policy with respect to Haitian aliens who continued to arrive in South Florida in the second half of 1981. __/ This is especially so because of the certainty that adherence to the old policy of uncritically granting parole would have continued to encourage new waves of arrivals, and would have led, in practice, to the unregulated presence of illegal aliens within the United States. See pages 3, 37-39, supra. It also would have been reasonable for decision makers to conclude that the new direction of federal policy to discourage illegal entry would be communicated with particular efficacy to persons of a given nationality contemplating unauthorized entry to the United States as that policy was applied to their countrymen who had already made the attempt. Devoting special administrative attention to the continuing influx of Haitian aliens thus would have been entirely permissible, if that did indeed occur. __/

__/ Even the court of appeals panel acknowledged that "the decade-long influx of undocumented immigrants from the Carribean Basin to south Florida presaged the end of the Administration's permissive attitude toward illegal immigration" and that the Mariel "boatlift" had the "greatest impact" in catalyzing this change (J.A. 198).

__/ As we have explained (pages 19-20 & note), petitioners have in this Court shifted or at least refined their claim so that they now attribute any discrimination solely to low-level INS enforcement officials. This new emphasis cannot affect the resolution of the constitutional question they present in this case. The authority to parole unadmitted aliens has been committed by Congress to the Attorney General. It is fundamental that even when exercised by his delegates, that authority is exercised in the name of the Attorney General; their actions are (Continued)

3. Petitioners portray this case in a quite different light, asserting (Br. 3) that "the record in this case demonstrates, without contradiction, [that] INS officials have discriminated invidiously against black Haitian refugees in deciding to incarcerate them initially, and in prolonging their incarceration without parole pending a determination of their asylum claims." As we have explained in more detail in our Brief in Opposition (pages 17-19 & n.13), however, petitioners have gravely misrepresented the posture of this case in this regard. To the extent that petitioners rely on the opinion of the court of appeals panel, their reliance is wholly impermissible, for the en banc court of appeals vacated the panel decision. See page 12, supra. __/ The opinion of en banc court does not disturb the findings of the district court, which include a determination that no unconstitutional discrimination occurred. See pages 7-9, supra.

In any event, even if the decision of the panel had not been vacated, it would be a weak reed to support petitioners' factual assertions. There is no occasion here to consider in detail the flaws in the panel's determination that petitioners had proven nationality discrimination. But it is plain at the threshold that the panel's entire analysis proceeds on the erroneous assumption that a showing that a nationality classification was applied would be sufficient to establish impermissible discrimination. See pages 48-50, supra. So far as the panel was con-

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his in contemplation of law. See 8 U.S.C. 1103(a). Any lack of conformity by the Attorney General's subordinates to his policies has no bearing on the question whether parole of an unadmitted alien may be ordered because of a constitutional violation. On the other hand, as the court of appeals held, a challenge to a denial of parole on abuse of discretion grounds may be based on disobedience of official policy by subordinate decision makers.

__/ The en banc court's statement (J.A. 295) that "the facts of this case have been extensively set forth in the opinions of the panel and the district court" plainly does not suggest that the en banc court adopted the panel's rulings on the discrimination issue. Petitioners' assertion (Br. 3 n.2) that the en banc court "implicitly concurred" in the panel's "findings" is simply fantastic.

cerned, if petitioners made out a prima facie case of nationality classification, it was open to the government only to show that no nationality classification was intended (see J.A. 243-244). __/

Moreover, the panel treated the case as though it presented a garden variety claim of invidious discrimination in a domestic context, relying upon cases concerning state action decided under the Fourteenth Amendment, in disregard of this Court's decisions establishing a quite different standard of review even for claims of discrimination against resident aliens under the Fifth Amendment. See pages 48-50, supra; see also Bertrand v. Sava, 684 F.2d at 218 n.17. Indeed, the panel relied heavily and impermissibly on Fourteenth Amendment decisions regarding jury selection challenges (J.A. 243-244). This Court's decisions, of course, make clear that statistical demonstrations of disparate impact -- which were the backbone of petitioners' evidentiary submission -- go much further toward establishing proof of discriminatory purpose in the jury selection context than they do in other cases. See Castaneda v. Partida, 430 U.S. 482, 493-494 (1977); Washington v. Davis, 426 U.S. 229, 241 (1976); see also Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). The panel also acknowledged relying upon the standards, burdens and methods of proof applied in cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (J.A. 244 & n.30); such reliance was erroneous. Washington v. Davis, 426 U.S. at 238. Finally, the panel displayed little of the required deference to the district

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__/ Elsewhere in its opinion the panel stated cryptically that "this case never reached the examination of a rational reason for the discriminatory treatment, because [petitioners'] prima facie case was unrebutted" (J.A. 216 n.11). The panel added (ibid.) that "[t]he effect of the line-drawing suggested by some [of the evidence] * * * [was] to deter with one narrowly formulated rule the immigration of aliens we do not wish to have enter, while treating quite differently other classes of equally 'illegal' immigrants." As we have explained above (pages 55-56), such a classification, if it indeed occurred, would have been at the very least presumptively permissible.

court's findings of fact. See Pullman-Standard v. Swint, 456 U.S. 273 (1982). Accordingly, even if it were relevant, this case does not come before the Court impressed with any credible determination that petitioners' claims have factual merit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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